

² The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On March 24, 2000 appellant, then a 51-year-old material handler, filed an occupational disease claim (Form CA-2) alleging that, on January 3, 2000, he first became aware of medical conditions and realized their relationship to his federal employment. He explained that his injury occurred as a result of repetitive duties including lifting bond paper, pushing and pulling a cart, bending, walking, and delivering paper from the warehouse to reproduction. Appellant retired on April 30, 2001.

OWCP initially accepted the claim for thoracic strain, lumbar strain, right hip strain, right knee strain, right shoulder strain, and right wrist strain. It subsequently expanded acceptance of the claim to include right knee osteoarthritis and a tear of the medial meniscus of the right knee. Appellant underwent right knee arthroscopy/meniscectomy on November 21, 2000. He underwent right shoulder arthroscopy with rotator cuff repair on February 25, 2010.

In a June 11, 2016 letter, appellant requested that his accepted conditions be expanded to include additional lumbar conditions including lumbar degenerative disc disease and a chronic left side radiculopathy. Medical evidence was submitted.

In a development letter dated July 14, 2016, OWCP noted that appellant's back surgery in 1983 and a work-related fall in December 1999 were unrelated to the current case. It advised that the evidence submitted was insufficient to expand the case for additional conditions and informed him of the type of evidence necessary to establish his claim. OWCP afforded appellant 30 days to submit the necessary evidence. Additional medical evidence was received.

By decision dated December 6, 2016, OWCP denied appellant's request to expand the acceptance of his claim to include additional lumbar conditions including left-side radiculopathy. It found that the medical evidence submitted failed to explain how the more serious lumbar conditions had been caused or aggravated by the accepted employment factors.

On December 28, 2016 appellant requested for reconsideration and submitted medical reports and authorization requests from Dr. Duc Thai Ngo, a Board-certified physiatrist. In his August 8, 2016 report, Dr. Ngo noted that appellant's position in the warehouse involved very heavy labor, which included the loading, unloading, moving, and delivery of very heavy furniture and appliances weighing between 200 to 800 plus pounds. Appellant alleged that he was required to do the same heavy work even on light duty. Dr. Ngo reported that appellant's preexisting back conditions and injuries had resolved. He opined that appellant's alleged heavy work in the warehouse for 13 years (at the time of the original claim of January 3, 2000) aggravated his preexisting lumbar disc degeneration and accelerated the lumbar degeneration process which resulted in the spinal stenosis and consequential radiculopathy. Dr. Ngo further opined that, more likely than not, minus the heavy warehouse work from 1987 to 2000, appellant would not have been symptomatic due to the lumbar radiculopathy in 2000.

On February 3, 2017 OWCP referred appellant, along with a statement of accepted facts (SOAF), to Dr. Steven Ma, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine whether the acceptance of the claim should be expanded to include lumbar radiculopathy and lumbar degenerative disc degeneration. It asked Dr. Ma to clarify whether appellant's current lumbar conditions were causally related to the work duties accepted in the January 30, 2000 work injury.

In a March 27, 2017 report, Dr. Ma reviewed the medical evidence of record, the SOAF, and noted examination findings. He reported that appellant reported an employment injury to his back in 1984 which resulted in surgery, while the SOAF indicated that this was a nonindustrial condition and not work related. Dr. Ma noted that he first started work as a janitor and was transferred to the linen department because of residuals to his back from his nonindustrial injury in 1984, which was resolved by back surgery in 1984. He opined that appellant's lumbar radiculopathy and lumbar degenerative disc degeneration were not causally related to the factors of employment described in the SOAF. Rather, all the findings on diagnostic testing showed that lumbar radiculopathy and lumbar degenerative disc degeneration were directly due to appellant's preexisting, nonindustrial injury, which were resolved by back surgery in 1984. Dr. Ma noted that such degenerative conditions were not claimed until recently and, given the fact that he had not worked for the last 16 years, it would not make medical sense that it was caused by his employment. He concluded that appellant's current lumbar degenerative disc disease and radiculopathy were due to his preexisting injury and surgery, which was much more traumatic to his back. Dr. Ma explained that appellant had residuals from the preexisting back injury and 1984 back surgery as he could not return to work as a janitor and began working in the linen area after his back surgery.

By decision dated April 24, 2017, OWCP denied modification of its December 6, 2016 decision. It determined that Dr. Ngo's August 8, 2016 report was not well rationalized or based on an accurate factual history, including the particular repetitive work factors accepted in the claim. OWCP afforded determinate weight to the second opinion report of Dr. Ma, who opined that appellant's lumbar degenerative disc disease and radiculopathy were not causally related to the January 30, 2000 employment injury.

On November 27, 2017 appellant requested reconsideration. In a November 20, 2017 letter, he alleged that he had worked for many years doing very hard work in the warehouse without back problems until January 2000. Appellant noted that he was happy that Dr. Ma had mentioned the history of his surgery, because if he had problems with his back, then he would not have been hired to work in the warehouse. He also voiced several concerns, which included an error with his CA-7 form, claim for compensation. Appellant alleged that his injury occurred on the job and that his conditions were due to what happened on January 3, 2000.

OWCP subsequently received a March 22, 2016 procedure note pertaining to a lumbar epidural steroid injection and a June 14, 2017 MRI scan report of the right knee.

Multiple medical progress reports and work status reports from Dr. Ngo from November 15, 2016 through February 7, 2018 were also received. Dr. Ngo provided information on appellant's examination findings, treatment plans, and work status. He continued to diagnose thoracic spine strain, lumbar muscle strain, derangement of medial meniscus of right knee, and

osteoarthritis of right knee, right shoulder strain, and impingement syndrome of right shoulder. Dr. Ngo also provided permanent modified work/activity restrictions. No further opinion regarding the cause of appellant's diagnosed conditions was provided.

By decision dated February 23, 2018, OWCP denied appellant's request for reconsideration, finding that he neither raised substantive legal questions nor submitted relevant and pertinent new evidence.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.³ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁴ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁵

A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁶ When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.⁷

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

Appellant's timely request for reconsideration did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered by OWCP. The underlying issue on appeal involved whether appellant's degenerative lumbar disc disease and left radiculopathy were caused or aggravated by his accepted January 3, 2000 employment injury. This is a medical issue which must be determined by

³ This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607.

⁵ *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be "received" by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the "received date" in the integrated Federal Employees' Compensation System (iFECS). Chapter 2.1602.4b.

⁶ 20 C.F.R. § 10.606(b)(3).

⁷ *Id.* at § 10.608.

rationalized medical evidence.⁸ Appellant's own opinion was duplicative of arguments he has made in the past, and does not constitute medical evidence. The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case.⁹ Consequently, appellant was not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

Furthermore, appellant failed to submit relevant and pertinent new evidence in support of his request for reconsideration.¹⁰ While he submitted new medical evidence, none of it provided a medical opinion on causal relationship. The June 14, 2017 MRI scan report of the right knee and a March 22, 2016 procedure note of a lumbar epidural steroid injection are not relevant and pertinent to the issue of a claimed causal relationship of appellant's lumbar spine conditions. Likewise, Dr. Ngo's progress reports and work status reports failed to provide an opinion as to whether the January 3, 2000 employment injury caused, aggravated, or contributed to the diagnosed lumbar disc degeneration and lumbosacral radiculopathy. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.¹¹ Thus, appellant is also not entitled to a review of the merits of his claim based on the third above-noted requirement under section 10.606(b)(3).¹²

The Board accordingly finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

⁸ *E.D.*, Docket No. 18-0138 (issued May 14, 2018); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

⁹ *See L.R.*, Docket No. 18-0400 (issued August 24, 2018); *Candace A. Karkoff*, 56 ECAB 622 (2005).

¹⁰ *M.C.*, Docket No. 14-0021 (issued March 11, 2014); *M.H.*, Docket No. 13-2051 (issued February 21, 2014).

¹¹ *See N.B.*, Docket No. 17-0927 (issued April 18, 2018); *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

¹² *H.H.*, Docket No. 18-1660 (issued March 14, 2019).

ORDER

IT IS HEREBY ORDERED THAT the February 23, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 11, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board